IN THE
SUPREME COURT OF MISSOURI

No. 84617

SHELTER MUTUAL INSURANCE COMPANY,

RESPONDENT,

v.

DIRECTOR OF REVENUE, STATE OF MISSOURI,

APPELLANT.

ON PETITION FOR REVIEW
FROM THE MISSOURI ADMINISTRATIVE HEARING COMMISSION
THE HONORABLE WILLARD C. REINE, COMMISSIONER

BRIEF OF RESPONDENT

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STATEMENT OF FACTS

Shelter's Operations

While Respondent Shelter Mutual Insurance Company ("Shelter") generally concurs with the limited facts presented in the Director's Statement of Facts, the Director omits several relevant facts. Therefore, Respondent sets forth the facts as follows:

Shelter is a mutual benefit insurance company duly licensed and registered to do business in Missouri (L.F. 9). Shelter's headquarters and main office ("Corporate Headquarters) is located in Columbia, Missouri (L.F. 9). Shelter's primary business is the sale and provision of insurance to policyholders (L.F. 10). This business is conducted at its Corporate Headquarters and elsewhere (L.F. 10). Shelter's Corporate Headquarters consists of grounds upon which Shelter has, among other things, a large office building ("Office Building") where Shelter's employees and officers conduct Shelter's business (L.F. 9).

The Office Building is accessible only by Shelter employees or others who are there to see an employee or officer (L.F. 9). Shelter restricts access to the Office Building by use of a key card system and/or a receptionist (L.F. 9). The key card system is an automated entry system whereby the holder of a key card can gain admission by swiping a card reader with the key card (L.F. 9). Only Shelter employees are issued key cards (L.F. 9).

Additionally, those entering the Office Building through the reception area must clear a receptionist (L.F. 9). The receptionist will not admit any visitor who is there to

see an employee until such employee first signs the person in and escorts the person through the Office Building (L.F. 9-10).

The Dining Room

For the convenience of its employees and officers, Shelter owns and operates a dining facility ("Dining Room") within the Office Building (L.F. 10). There, during regular business hours, Shelter employees serve meals and drinks to Shelter's employees and visitors escorted to the Dining Room by Shelter employees (L.F. 10).

Shelter charges all patrons of its Dining Room for their purchases of meals and drinks in the Dining Room (L.F. 10). However, the amount charged Dining Room patrons does not recover Shelter's cost; Shelter subsidizes the operation of the Dining Room (L.F. 10). Indeed, to the extent Shelter is successful in obtaining a refund of Missouri sales and related local sales taxes sought in this case, Shelter will use such moneys for the benefit of its employees (Tr. 7). Specifically, Shelter will either improve the Dining Room by purchasing new tables, chairs or display coolers or it will increase the subsidy on meals and drinks purchased by Dining Room patrons (Tr. 7).

Shelter's Sales Tax Returns and Audit

Shelter files sales and use tax returns with the Director on a monthly basis (L.F. 10). Shelter did not pay sales or use tax on its purchases of meal and drink components for preparation and sale at the Dining Room because it submitted resale certificates to its vendors (L.F. 10-11). If Shelter had remitted Missouri and related local sales tax on its purchases of meal and drink components, Shelter would have incurred tax in the amount

of $50,456 for the periods October 1995 through March 1999 (the "Tax Periods") (L.F. 11).

Shelter collected and remitted to the Director sales tax on its sales of meals and drinks in the Dining Room in the amount of $110,053.97 during the Tax Periods (L.F. 11). Shelter timely filed its Refund Claim in the amount of $110,053.97 on the basis that the Dining Room is not a place that regularly sells meals and drinks to the public (L.F. 11). On April 3, 2000, the Director issued a Final Decision denying Shelter's claim; on May 26, 2000, Shelter timely appealed the Final Decision to the Administrative Hearing Commission (L.F. 11).

Commission's Decision

On June 13, 2002, the Commission entered its decision. The Commission, citing this Court's decision in *J.B. Vending Company, Inc. v. Director of Revenue*, 54 S.W.3d 183 (Mo. banc 2001), determined that the Dining Room was not a place that regularly served meals and drinks to the public, and therefore concluded that Shelter was entitled to the refund sought in the Refund Claim (L.F. 12-15).

The Commission also rejected the Director's argument that the Refund Claim should be offset by the amount of the sales tax that would have been remitted had Shelter not provided resale certificates to its vendors. The Commission concluded that it was without power to order the offset in the absence of an assessment by the Director (L.F. 15-16).[1] This appeal followed.

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[1] The Director has since issued assessments against Shelter for tax on its purchases.

STATEMENT OF THE ISSUES

1. Section 144.020.1(6)[2] excludes from Missouri sales tax the sales of meals and drinks at places where meals and drinks are not regularly served to the public. Shelter sells meals and drinks only at its Dining Room. The Dining Room, operated by Shelter employees, serves only Shelter employees and business visitors. Shelter subsidizes the Dining Room, and consequently denies access to the Dining Room to all other persons. Are Shelter's sales of meals and drinks to only Shelter's employees and business visitors excluded from Missouri sales tax under Section 144.020.1(6)?

2. Chapter 144 sets forth procedures the Director must follow and deadlines she must meet to assess Missouri sales tax. May the Director effectively intercept a Missouri sales tax refund in lieu of issuing an assessment in compliance with Chapter 144's assessment procedures and deadlines?

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[2] All statutory citations are to the Revised Statutes of Missouri of 2000, as amended, unless otherwise noted.

STANDARD OF REVIEW

The decision of the Commission shall be upheld if it is: (1) authorized by law; (2) supported by competent and substantial evidence upon the whole record; (3) if no mandatory procedural safeguards are violated; and (4) where the Commission has discretion, it exercises discretion in a way that is not clearly contrary to the Legislature's reasonable expectations. Section 621.193; *Concord Publishing House, Inc. v. Director of Revenue,* 916 S.W.2d 186 (Mo. banc 1996). The first two standards are applicable in this case.

This case involves the construction of Sections 144.020.1(3), 144.010.1(9) and 144.060, all of which are tax imposition statutes. Tax imposition statutes are strictly construed against the Director, and if the right to tax is not plainly conferred by statute, it will not be extended by implication. *United Air Lines, Inc. v. State Tax Commission*, 377 S.W.2d 444, 448 (Mo. banc 1964), *quoting Leavell v. Blades*, 141 S.W. 893, 894 (Mo. 1911) ("When the tax gatherer puts his finger on the citizen, he must also put his finger on the law permitting it.").

ARGUMENT

I. THE ADMINISTRATIVE HEARING COMMISSION DID NOT ERR IN FINDING THAT SHELTER'S DINING ROOM SALES WERE EXCLUDED FROM MISSOURI SALES TAX BECAUSE UNDER SECTION 621.193, THAT FINDING IS SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE AND AUTHORIZED BY LAW IN THAT: (1) SECTION 144.020.1(6) EXCLUDES THE SALES OF MEALS AND DRINKS AT PLACES WHERE MEALS AND DRINKS ARE NOT REGULARLY SERVED TO THE PUBLIC AND; (2) SHELTER'S DINING ROOM IS NOT A PLACE WHERE MEALS AND DRINKS ARE REGULARLY SERVED TO THE PUBLIC.

Introduction

In *Greenbriar Hills Country Club v. Director of Revenue*, 935 S.W.2d 36 (Mo. banc 1996), this Court concluded that Section 144.020.1(6) excludes from taxation "meals or drinks made by any place that does not regularly serve meals or drinks to the public." *Id.* at 38. This decision is the law, and has been the law since 1996. Nevertheless, the Director appears to argue in this case that, as a matter of law, no seller can qualify for Section 144.020.1(6)'s exclusion. The Director's argument is without merit because it is contrary to numerous decisions of this Court, contrary to the plain meaning of Section 144.010.1(6), and contrary to at least two of the Director's regulations. Furthermore, the Director's construction reduces Section 144.020.1(6)'s phrase "regularly served to the public" to mere surplusage. Last, the Director's

construction of Section 144.020.1(6) is contrary to the rule of statutory construction that tax statutes are to be strictly construed against the Director.

The Director purports to rely on *J.B. Vending Company, Inc. v. Director of Revenue*, 54 S.W.3d 183 (Mo. banc 2001), in which this Court acknowledged the existence of Section 144.020.1(6)'s exclusion, but based its decision on the application of that case's facts to the exclusion. This Court concluded that a commercial vendor in the business of making retail sales of meals and drinks, and that held itself out "as ready to contract with any employer and to serve those who present themselves," was still selling regularly to the public when making sales at a third party's lunch room that the third party restricted to its employees and guests. This Court expressly distinguished the facts of that case from facts like those herein.[3]

None of the theories offered by the Director demonstrates that the Commission had no competent and substantial evidence to support its factual determination that Shelter was not regularly serving meals and drinks to the public at its Dining Room. Likewise, none of the theories offered by the Director demonstrates that the Commission

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[3] "But even if a sale of meals and drinks to one's own employees would be sufficiently distinct that it would not constitute a taxable sale of meals or drinks 'to the public,' that is not the situation before us in this case." (footnote omitted). *J.B. Vending*, 54 S.W.3d at 189.

misapplied the law. This Court should affirm the decision of the Commission that Shelter's Dining Room sales are excluded from tax under Section 144.020.1(6).

A. Shelter's Sales are Excluded From Tax by Section 144.020.1(6).

Section 144.020.1(6) imposes a sales tax upon vendors who sell meals and drinks at places that regularly serve meals and drinks to the public. That section, however, excludes from the tax the sales of meals and drinks made at places where they are not regularly served to the public. *Greenbriar*, 935 S.W.2d at 38; *Westwood Country Club v. Director of Revenue*, 6 S.W.3d 885, 887 (Mo. banc 1999); *J.B. Vending Company, Inc. v. Director of Revenue*, 54 S.W.3d 183, 186 (Mo. banc 2001).

The issue in this case is whether Shelter regularly serves meals and drinks to the public. The Commission concluded that Shelter was not regularly selling meals and drinks to the public because: (1) Shelter owned the Dining Room; (2) Shelter operated the Dining Room; (3) Shelter subsidized the sales at the Dining Room and thus restricted its sales at the Dining Room to Shelter's employees and guests, and (4) Shelter was not in the business of making sales of meals and drinks for "gain benefit, or advantage" (L.F. 13-15). The Commission, citing Section 144.020.1's definition of "business," concluded:

> "First of all, Shelter subsidizes the cafeteria in part and does not make a profit from its operation. The only apparent benefit from the operation of the cafeteria is as a convenience to Shelter's employees. It is thus questionable whether Shelter operates the cafeteria with the object of gain, benefit, or advantage.

> "Second, the classification of the enterprise is not of such character as to be subject to the terms of sections 144.010 to 144.525. The cafeteria does not serve the public. It is a private enterprise run by a business for the exclusive benefit of its employees and invited guests. Any group of people is a subset of the public, but a restricted, operator-owned cafeteria should not be construed to serve the public merely by virtue of that fact." (L.F. 13-14) (footnote omitted).

The Director's argument, as acknowledged by the Commission above, is simple. Purportedly relying on *J.B. Vending*, the Director claims that because the patrons of every dining facility, including private ones, are a "subset of the populace," all sellers of meals and drinks regularly sell "to the public," and are thus taxable (Dir. Br. 19). That argument is not, however, supported by the *J. B. Vending* decision. There, this Court did not opine that all sales of meals and drinks are "to the public." Rather, this Court concluded that a seller did not have to make "its product available to the entire populace" to sell "to the public." *Id*. at 186. Thus, it reasoned that a bar that was limited to adults, or a restaurant limited to those who are wearing shoes and shirts or holding a reservation, was still regularly serving the public. *Id*. at 188. But that conclusion is a far cry from a holding that every place regularly serves the public.

In fact, this Court distinguished *J.B. Vending*'s facts from facts like those in this case:

"While it is true that those who eat at J.B.'s cafeterias are usually employees, ***they are not J.B.'s employees***. J.B.'s employees are the people who staff its cafeterias, for ***J.B. is in the business of operating cafeterias in buildings***. As to J.B., the persons it sells meals and drinks to are, in effect, strangers; they are just those members of the public whom the building owners allow in the building. They have no contractual or other special relationship with J.B. The fact that J.B. sells food to someone else's employees does not render it unique—any food seller normally does that. ***In arguing otherwise, J.B. improperly mixes its role with that of the employers who own the buildings in which it operates.***

"In sum, J.B. holds itself out ready to contract for cafeteria services with any company that hires its services. It has, in fact, contracted with thirteen employers who own restricted-access buildings to sell meals and drinks to anyone who comes to J.B.'s cafeterias in those buildings. While some of the employers with whom J.B. contracts limit who can enter their buildings, ***that is the choice of the employer***. ***J.B. does not limit sales to only its own employees, or even to only building employees***. It holds itself out ready to contract with any employer and to serve those who present themselves at its cafeteria lines and serves all who appear at its cafeterias. Identification is not required. Any member of the public

who can gain access to the building can eat in the cafeteria. J.B.'s cafeterias regularly serve meals and drinks to the public." [4] *Id.* at 189.

The Director argues that a "fair reading" of *J.B. Vending* provides that sales to one's own employees constitute sales "to the public" (Dir. Br. 18). If that is so, why did this Court make the above-cited distinction? This Court's detailed distinction of the two roles cannot be reconciled with the Director's argument.

By contrast to *J.B. Vending*, Shelter owns the Dining Room. Shelter, and not some third party, restricted its sales of meals and drinks at its Dining Room to Shelter's employees and guests; a restriction explained by Shelter's subsidies of the meal and drink sales to its employees. Shelter's business is the sale and provision of insurance to its policyholders; not the sale of food and drink. Shelter does not sell meals and drinks to the public in the Dining Room.

B. The Director Attempts to Read the Words "Regularly Served to the Public" Out of Section 144.020.1(6).

In construing any statute, this Court is required to determine the Legislature's intent from the words used. *Community Federal Savings & Loan Association v. Director of Revenue*, 752 S.W.2d 794, 798 (Mo. banc 1988). In determining the Legislature's intent from the words used in Section 144.020.1(6), "every word, clause, sentence and provision of a statute [is to] have effect," and "it will be presumed that the Legislature did

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[4] Emphasis added here and throughout, unless otherwise noted.

not insert idle verbiage or superfluous language in a statute." *Hyde Park Housing Partnership v. Director of Revenue*, 850 S.W.2d 82, 84 (Mo. banc 1993). Thus, the words "regularly served to the public" must serve as some limitation on the taxability of sales of meals and drinks. Furthermore, tax statutes like Section 144.020.1(6) are to be strictly construed against the Director and in favor of taxpayers. *United Air Lines, Inc. v. State Tax Commission*, 377 S.W.2d 444, 448 (Mo. banc 1964).

The Director's argument, that all sales of meals and drinks are to the public because all purchasers are a subset of the public, cannot be reconciled with the rules of statutory construction. The Director's argument renders the phrase "regularly served to the public" mere idle verbiage or surplusage and is hardly a strict construction in favor of the taxpayer.

Even the Director's own regulations recognize that Section 144.020.1(6)'s exclusion is more than a mere fiction. Those regulations make the exact distinction that, in this case, the Director denies exists. Those regulations recognize that sales to certain "subsets of the public" are not to the public, and are thus excluded from tax. Specifically, Regulation 12 CSR 10-3.048(7) provides:

> "If a club regularly serves food and beverages to the public, all sales are subject to sales tax on the amount of gross receipts. ***If a club does not regularly serve food and beverages to the public, other than its members and its guests***, and the club acts as a cooperative association for the benefit of its members, the club has the option of either collecting and remitting sales tax on its sales to members and

> guests or paying sales tax on the club's purchases of food and beverages (see section 144.020.1(6), RSMo)."

This regulation has been in effect since 1991, long before the *Greenbriar* decision, and recognizes that a country club's sales to its members and guests are not sales "to the public."

Likewise, Regulation 12 CSR 10-3.404, entitled "Cafeterias and Dining Halls" provides:

> "Tax exempt schools, charitable institutions, colleges and universities operating lunch rooms, cafeterias, dining rooms or any other facilities where meals are provided to students are not in the business of selling regularly to the public and are not subject to the sales tax. This exemption does not apply to food, drink and snacks sold at student unions and the like, where the items are equally available to and sold to the public."

This regulation, in effect since 1981, recognizes that a dormitory cafeteria that serves only students is not a place where meals and drinks are regularly sold "to the public."

Obviously, college students and country club members are as much a subset of the public as are Shelter's employees. Shelter operates its Dining Room for Shelter's

employees' benefit rather than Shelter's pecuniary gain (Dir. Br. 20-21).[5] Indeed, apparently for the very reason that Shelter operates the Dining Room at a loss, Shelter takes all necessary steps to ensure that the Dining Room ***does not serve the public*** because Shelter does not wish to subsidize the public's consumption of meals. In short, no meaningful distinction can be drawn between Shelter's sales at the Dining Room and the country club's or college's sales described in 12 CSR 10-3.048(7) and 12 CSR 10-3.404. Moreover, the Director's regulations correctly reflect the law, unless the Director is correct in her argument herein that Section 144.020.1(6)'s exclusion applies to nobody.

C. The Director's Request to Expand the Tax Statute Is Without Merit.

The Director makes several policy arguments for why, in her opinion, this Court should expand the sales tax code by subjecting all meal and drink sales to sales tax by judicially removing the "regularly served to the public" language of Section 144.020.1(6) (Dir. Br. 21-23) ("This Court has the opportunity to adopt a rule taxing all sales of meals and drinks in restaurants (or cafeterias) that serve ***any segment of the public***"). Under the Director's analysis, "any segment of the public" is a paraphrase for "anybody." These arguments should be rejected by this Court for at least two reasons. First, even if her policy arguments were convincing, they are properly addressed to the Legislature

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[5] Although not evidenced by the record, the Director hypothesizes that the Dining Room constitutes a benefit used to recruit and retain employees and increases efficiency by allowing employees to eat without leaving Corporate Headquarters (Dir. Br. 21).

rather than to this Court. Second, the Director's policy arguments are unconvincing, as evidenced by the fact that her position is inconsistent with two of her own regulations.

1. This Court Should Not Legislate.

The Director asks this Court to ignore the plain language of the statute, and delete the language "regularly served to the public" from Section 144.020.1(6) in order to "adopt a rule taxing all sales of meals and drinks" (Dir. Br. 22). In so doing, the Director asks this Court to impermissibly substitute its judgment for that of the Legislature. *See*, *e.g.*, *Greenlee v. Dukes Plastering Service*, 75 S.W.3d 273, 277-78 (Mo. banc 2002) ("It is not the Court's province to question the wisdom, social desirability or economic policy underlying a statute as these are matters for the legislature's determination.").

The same response applies to the Director's invitation to this Court to "correct any lingering misapprehension of the holdings in *Greenbriar* and *Westwood*" (Dir. Br. 22). In *Greenbriar*, this Court held, in no uncertain terms, that tax was not due on the sale of "meals or drinks made by any place that does not regularly serve meals or drinks to the public." This Court's construction of Section 144.020.1(6) in *Greenbriar* became a part of the statute, particularly since the Legislature amended Section 144.020 in 1998 without changing Section 144.020.1(6) in response to *Greenbriar*. *See*, S.B. 627, effective July 10, 1998; *Unitog Rental Services, Inc. v. Director of Revenue*, 779 S.W.2d 568, 572 (Mo. banc 1989). Therefore, the "correction of any lingering misapprehension" should be done by the Legislature and not this Court. What the Director asks this Court to do is to judicially legislate, unencumbered by Hancock Amendment restrictions or the requirement to post a fiscal note.

And, if this Court accepted the Director's invitation to so legislate, this Court would thereby overrule not only the *Greenbriar* and *Westwood Country Club* decisions, but two of the Director's regulations that have been in effect for over ten years.

2. The Director's Policy Arguments Are Unavailing.

In her briefs and during the oral argument of *J.B. Vending* to this Court, the Director understandably made every effort to distinguish J.B. Vending's sales from Greenbriar's and Westwood's sales. That is why she continually stressed that J.B. Vending's sales were taxable because J.B. Vending held itself out to the public to operate lunchrooms for which J.B. Vending imposed no restrictions. For example, page 3 of her reply brief therein (attached as Appendix A) states:

> "J.B. accomplishes this [selling to the public] by holding itself out to the public as a business that will operate cafeterias and sell meals at the facilities of its business and manufacturing clients…. In other words, J.B. offered to operate cafeterias and to sell meals to anyone who desired those services."

Likewise, at oral argument in *J.B Vending*, the Director continually focused on the "third-party contractor" in arguing that the sales were subject to taxation because the vendor sold "to all comers" and imposed no restriction on its sales.

In the *J.B. Vending* decision, this Court made the distinction the Director asked it to make, concluding that J.B. Vending sold to the public because it was willing to sell to whomever presented themselves. Now, in the Director's variation of "bait and switch," she contends that the distinction she offered in *J.B. Vending* (whether the seller is willing

to sell to all comers) is unworkable. But that distinction is not unworkable; entities like country clubs, colleges and universities (dormitories), and sellers like Shelter who greatly restrict to whom they sell, are excluded from tax, while commercial vendors are not. Even if the distinction were unworkable, the solution would not be, as the Director claims, to construe Section 144.020.1(6)'s exclusion out of existence.

The Director first argues that making a distinction between a commercial meal vendor and Shelter is a distinction inconsistent with rational tax policy (Dir. Br. 21). Apparently, the Director forgets that she first offered that type of distinction to this Court in the *J.B. Vending* case. Perhaps, consistent with the legislature's desire to have the sales tax apply to people "in the business" of making sales, the legislature concluded that people who refuse to regularly sell to the public should be excluded from tax. In her brief herein, the Director asks, "Why should those other cafeterias or restaurants be responsible for collecting tax, but not Shelter?" (Dir. Br. 19). The answer is simple. Shelter is unwilling to sell meals and drinks to anyone other than its employees and guests; the commercial vendor, as the Director repeatedly argued in *J.B. Vending*, sells to all comers. Apparently the legislature thought it important for purposes of taxation that the vendor regularly sell to the public, and that is why Section 144.020.1(6) reads as it does. Neither the country club, nor Shelter, nor for that matter the parents charging their college son for his board while living at home, are doing so for gain or profit in the normal sense. Section 144.020.1(6)'s exclusion could be a recognition of that fact.

The Director's second policy argument is that a decision in Shelter's favor would spawn additional litigation. This is both untrue and irrelevant. In support of her dubious

"litigation explosion scenario," the Director argues that, among others, casinos and adult cabarets could attempt to exclude sales from taxation under Section 144.020.1(6), arguing that governmental age restrictions would cause the sales to be treated as "nonpublic." In fact, this Court in *J.B. Vending* concluded that such sales would not be excluded under Section 144.020.1(6) because the restricting party would be the government rather than the seller. Furthermore, even if a decision excluding Shelter's Dining Room sales would engender additional litigation, this would stand as no reason to deny Shelter's claim under the language of Section 144.020.1(6).[6]

In summary, Shelter's Dining Room sales are excluded from taxation under Section 144.020.1(6) because the Dining Room does not regularly sell meals and drinks to the public. Therefore, this Court should affirm the Commission's decision upholding Shelter's Refund Claim on Missouri and related local sales taxes paid during the Tax Periods on these sales.

[6] The Commission stated in footnote 3 of its decision (L.F. 12) that 43 of its pending cases are held in abeyance pending a decision herein. But only a handful of those cases involve vendor-imposed access restrictions as in this case.

II. THE ADMINISTRATIVE HEARING COMMISSION DID NOT ERR IN REFUSING TO OFFSET SHELTER'S REFUND BECAUSE UNDER SECTION 621.193 THAT DECISION IS SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE AND AUTHORIZED BY LAW IN THAT SUCH AN OFFSET AMOUNTS TO AN ASSESSMENT AND NO ASSESSMENT WAS BEFORE THE COMMISSION.

In *Westwood Country Club v. Director of Revenue*, 6 S.W.3d 885 (Mo. banc 1999), this Court determined that a taxpayer's purchases of meal and drink components are subject to sales or use tax if the resultant sales of meals and drinks were excluded from tax. Since the last Tax Period in this case was March 1999, Shelter did not have the benefit of this Court's decision in *Westwood*. Accordingly, it remitted sales tax on its meal and drink sales, but did not remit sales or use tax on its purchases of meal and drink components by purchasing under resale certificates. The Director asked the Commission, and now asks this Court, to subtract the amount of sales or use tax that Shelter should have paid on its purchases of meal and drink components from the amount of sales tax it overpaid on the sales in the Refund Claim. The Commission noted that the Refund Claim did not address the taxability of purchases, that the Director had not followed statutory assessment procedures, and, accordingly, refused to allow the Director an "offset" (L.F. 15-16). The Commission's determination in this regard is supported by law.

Sections 144.210.2, 144.670 and 144.220 provide the Director authority to issue an assessment of sales or use tax so long as she gives proper notice and issues the proposed assessment within a prescribed period of time (usually three years from the date

the return was due). The Director did not follow these procedures in this case until after the Commission issued its decision; a separate assessment is now pending.

The Director now invokes "equity" in an attempt to avoid the statute of limitations on assessments set forth in Section 144.220 (Dir. Br. 28-30). Actually, the use of the term "equity" is a misnomer since the Director is perfectly willing to invoke limitations statutes to keep an overpaid tax. In *Community Federal Savings & Loan Association v. Director of Revenue*, 796 S.W.2d 883, 886 (Mo. banc 1990), this Court rejected a taxpayer's "appealing" argument to invoke equity to avoid the statute of limitations on refund claims. In doing so, this Court observed "to utter 'tax' and 'equity' in the same sentence is to speak in contradictory terms." *Id.* In short, tax statutes are construed according to their terms without resort to equitable considerations. Therefore, this Court should reject the Director's plea for what would amount to one-way "equity."

The Director relies upon *Jones v. Director of Revenue*, 981 S.W.2d 571 (Mo. banc 1998), but her reliance is misplaced. In *Jones*, the Director had issued a final assessment against a corporation for Missouri sales tax. After that assessment became final, the Director issued a second assessment against a responsible party under Section 144.157.3. The responsible party challenged the amount of the assessment by asserting that some of the corporation's purchases were exempt under Section 144.030.2(2)'s component part exemption and that the corporation overpaid its sales tax on those purchases. This Court held that the Commission's role was to determine the correct amount of tax due on the transactions at issue in the assessment, and determined that the Commission correctly

reduced the amount of the responsible party's assessment to reflect the component part exemption.

In this case, however, no assessment was pending before the Commission at the time of its decision. Instead, the Commission had before it a Refund Claim relating to Shelter's overpayment of sales tax on its sales at the Dining Room. The Commission's refusal to consider the Director's argument for the taxation of Shelter's purchases was correctly based on the absence of a valid assessment in compliance with statutory procedures. *See Dyno Nobel, Inc. v. Director of Revenue*, 75 S.W.3d 240 (Mo. banc 2002) (failure of Director to make valid assessment precludes defense against refund claim).

The most troubling aspect of the Director's argument in this regard is her effort to circumvent the limitations statute, Section 144.220, which serves as a protection for taxpayers. For periods where records may be scarce and memories fading, Section 144.220 is the only defense a taxpayer has to an assessment because in the vast majority of cases, including this case, the taxpayer bears the burden of proof. Sections 621.050.2 and 136.300. Allowing the Director to intercept a refund in this manner presents a serious potential for abuse because the Director could assert an "offset" on unrelated transactions to reduce or eliminate a refund. While taxpayers must maintain all of their records to support their refund claims, taxpayers are not on notice to retain all records related to all other transactions not contemplated under their refund claims. In the unfortunate case where a taxpayer has discarded records for the other transactions that the Director wants to examine to defeat or offset a refund claim, the taxpayer is powerless to

disprove the offset. Even though that circumstance did not present itself here, it easily could have since the earliest Tax Period was October 1995. This "offset" calculation amounts to a form of "bait and switch" by leading a taxpayer to believe that the assessment period is three years when in fact it effectively could be much longer.

The Director argues that Section 144.190 requires an offset with respect to claims for refund. However, Section 144.190 does not require or authorize the offset of a refund for any tax liability that is outside the statute of limitations because taxpayers are not legally obligated to remit tax under such circumstances. Section 144.190 provides:

> "If any tax, penalty, or interest has been paid more than once, or has been erroneously or illegally collected, or has been erroneously or illegally computed, such sum shall be credited ***on any taxes then due from person legally obligated to remit the tax pursuant to sections 144.010 to 144.510***, and the balance, with interest as determined by section 32.065, RSMo, shall be refunded[.]"

Even assuming *arguendo* that the Director is entitled to offset against claims for refund under Section 144.190.2, the Director has no right to an offset for potential tax liabilities outside the statute of limitations because Shelter has no "duty to remit" such taxes since the Director is not authorized to assess them under Section 144.220. Therefore, even using the Director's interpretation of the statute, she is not entitled to an offset for periods outside the statute of limitations.

CONCLUSION

The Commission did not err in concluding that Shelter's Dining Room sales of meals and drinks were excluded from sales tax. Furthermore, the Commission did not err in denying the Director an offset of sales or use taxes due on purchases against sales tax overpaid on sales for the Tax Periods.

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CERTIFICATE OF SERVICE

I hereby certify that two true and accurate copies of the foregoing, as well as a labeled disk containing the same, were mailed first class, postage prepaid or hand-delivered this 30th day of October 2002, to Evan J. Buchheim, Assistant Attorney General, Missouri Attorney General's Office, P.O. Box 899, Jefferson City 65102.

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CERTIFICATE REQUIRED BY SPECIAL RULE 1(C)

I hereby certify that the foregoing brief includes the information required by Supreme Court Rule 55.03 and complies with the limitations contained in Supreme Court Special Rule 1(b). The foregoing brief contains 6,039 words.

The undersigned further certifies that the disk simultaneously filed with the briefs filed with this Court under Supreme Court Rule 84.05(a) has been scanned for viruses and is virus-free.

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